

No. 10,229

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit 12

AMERICAN SURETY COMPANY
(a corporation),

Appellant,

VS.

UNITED STATES OF AMERICA,

Appellee.

REPLY BRIEF FOR APPELLANT.

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FILED

FEB - 1 1943

PAUL P. O'BRIEN,
CLERK

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Appellant desires to emphasize at the outset of this reply brief that counsel for Appellee are mistaken, to say the least about it, in contending, as they do in the "Statement" in the brief for Appellee, that all the essential allegations of fact in the complaint, except as regards the amount of damages, are admitted either by the answer filed or by express admissions at the time of trial. On the contrary the Government was put to its proof by Appellant to establish the all-important allegations of the Government's complaint herein (a) that it "completed" the Grogan contract, and (b) that it was damaged. Paragraphs IX and X (Tr. 6 and 7) and part of Paragraph XI (Tr. 8) of the said complaint, wherein is alleged completion of the Grogan contract by the Government, that it was

damaged and the amount of the damages, were expressly denied in the answer of Appellant (Tr. 31) and those allegations of the complaint were not admitted at the time of trial. The principal contention of Appellant, both by specification of errors and argument in its brief, has been and still is that the Government has wholly failed to prove either "completion" of the Grogan contract by it or the damages pleaded, and, hence, that there is no evidence in the record to support the judgment, either as to claimed "excess cost" or as to the item of damages for delay.

Thus counsel for the Government are also mistaken in asserting, as they have in their said brief, that the denials and assignments of error of Appellant go only to the amount of damages the Government may recover and not to the fact that the Government was damaged. Such is not the case at all. The specification of errors (page 4 of brief of Appellant) speaks for itself and contradicts the assertion as to its effect. The assertions regarding the denials of the Appellant are contrary to the record, as we have already pointed out.

THE MATTER OF LIQUIDATED DELAY DAMAGES.

It is sufficient reply, in the main, to the Appellee's argument on this subject to point out that all of the decisions of the Court of Claims construing contract provisions identical with those involved in the case at bar announce the rule for which Appellant contends here. In addition the United States Court of Appeals for the District of Columbia, likewise construing iden-

tical contract provisions, has decided by a full court that the Government may not recover liquidated damages under such conditions as exist in the case at bar, saying: "Similar provisions in government contracts have been consistently so construed by the Court of Claims." (citing cases).

It is instructive to note that in the said decision by the United States Court of Appeals for the District of Columbia, which is the *Cunningham* case (125 F. (2d) 28), the Court also says:

"The only case cited by the United States where liquidated damages and excess costs were both recovered under a contract such as we have here is *Continental Casualty Company v. United States*, 113 F. (2d) 284, affirming 29 F. Sup. 598, Certiorari denied 311 U. S. 696. However, the question whether these are alternative rights was not mentioned in either the Circuit Court or the District Court opinion and does not appear to have been raised by the parties. * * * The case is, therefore, not helpful on the point in discussion here."

The Government is still unable to cite any decision by the courts, other than the one appealed from herein, where the contract construction for which it contends has been upheld, and it does little more than rely upon certain dissenting opinions in the Court of Claims to sustain its position. In the latest decision by the Court of Claims, one that through inadvertence was not cited in our initial brief, the court divides on the question but the majority opinion supports the stand of the Appellant here. The case in question is that of

Maryland Casualty Company v. United States, decided March 3rd, 1941, and reported in 93 Court of Claims 247. The first portion of the syllabus of the case reads as follows, to-wit:

“Government contract; collection of both liquidated damages and excess costs.—Where the Government, in accordance with the terms of a construction contract, because of delay and default on the part of the contractor terminated said contract after the time provided for the completion thereof, and took over and completed the work; it is held that the Government may not collect both (1) liquidated damages for the period that elapsed after the time provided for completion and before the Government exercised its option to terminate said contract and (2) the excess costs which were incurred by the Government in completing the work.

Same; waiver.—The defendant, having exercised its right to terminate a construction contract and to proceed with its completion, thereby waived its claim to liquidated damages.”

In this *Maryland Casualty Company* case paragraph 9 of the contract involved was identical with paragraph 9 of the contract in the case at bar. There Government counsel contended that under the terms of the contract it was permitted to recover liquidated damages that had accrued before notice of termination and that after termination the Government was entitled to excess costs. That claim was rejected by the court which said:

“Article 9 gives the government the choice of permitting the contractor to continue and collect-

ing \$35.00 per day as liquidated damages for delay or pursuing the other course by taking over and finishing the work and collecting the excess cost incurred in the completion of the contract. By its terms it does not give the government the right to collect both. The defendant having exercised its right to terminate the contract and to proceed with its completion, it thereby waived its claim to liquidated damages. *Fidelity Casualty Co. of New York v. United States*, 81 C. Cls. 495; *Commercial Casualty Insurance Co. v. United States*, 83 C. Cls. 367; *American Employer's Insurance Company of Boston v. United States*, 91 C. Cls. 231; *U. S. for Use and Benefit of General Lighterage Company v. Maryland Casualty Co.*, 25 Fed. Supp. 778.

In each of these cases the work was completed after the Government had terminated the right of the contractor to proceed. In the *Fidelity* case, *supra*, the Government terminated the contract on the day that had been fixed for completion of the work. In each of the cases the work was actually completed after the date that had been fixed in the contract. In each of the cases the Government had been subjected to whatever damages might have been caused by the delay in completing the contract. It was held, however, that since the contractor's right to proceed in each case had been terminated, the defendant had chosen its course of procedure and would be limited to the excess costs incurred in the completion of the work. The *General Lighterage Company* case, *supra* (District Court, Maine), is in all respects similar to the case at bar. The issues involved in the two cases are identical.

The instant case is clearly distinguishable from American Employer's Insurance Co. case. In the latter case, a separable portion of a divisible contract which was to be completed at an earlier date had already been completed, but not within the date specified in the contract. The liquidated damages that attached to the delay in construction of that particular building had already accrued and had become due prior to the date of cancellation. The cancellation, therefore, was as to the other portion of the contract."

That two judges dissented in the case is rather beside the question. The fact still remains that the majority of the court decided the case as stated, *supra*, and that the rule there announced became the law applicable to a contract such as the one here involved. On reason as well as precedent the decision should be the law of the case at bar. The able but wordy argument of Government counsel on the liquidated damage question seems to Appellant to be nothing more nor less than a labored attempt to persuade this court to read into the contract here matter which it does not contain and which the courts refuse to interpolate as that would be making a new contract for the parties. Courts are without power to change the contract of the parties.

The Government, therefore, is mistaken in stating (page 10 of Appellee's brief) that the few reported cases on the construction given government contract provisions such as are found in Article 9 of the construction contract here are inconsistent with each other. They are further mistaken in saying that the

clearer, more cogently reasoned decisions are in accord with that of the trial court from which the appeal herein has been taken. As a matter of fact there are no reported decisions other than that of the trial court that support the Government's position here. Neither are there any decisions, either cogently reasoned or otherwise, that are in accord with that of the court below.

It should be noted, too, that the Government disregards, in its argument on the question of liquidated damages and on the effect of Article 9 of the construction contract, that this court must be governed by what "the draftsman" for the Government did in his use of language in the contract here and not by what he "dealt with", had in mind to do or was directed to do. Here the draftsman has used plain language that measures and settles the matter of intent for all concerned and leaves the entire argument of the Government without any support or foundation whatever.

It may be, as we have said in our initial brief, that the Government might recover damages for delay as part of its "excess cost", but it is elementary that any such damages for delay would have to be pleaded as a basis for their recovery. Here there is no pleading basis for the recovery of such special damages. But otherwise there is no right here to delay damages as the contract makes plain and the courts have decided. We stand, therefore, as heretofore, upon the claim that the award by the trial court of liquidated damages is contrary to the plain and unambiguous terms of the contract and that it is without support in the decided cases.

THE MATTER OF THE DAMAGE ITEM OF \$2044.04.

The Government in its complaint alleges:

“That because of the wrongful refusal of the said Defendant John V. Grogan to complete his said contract * * * it became necessary for the plaintiff to complete and cause the said work to be completed and that in doing the same and completing the said work the plaintiff expended in the completion of the same the sum of \$3781.00, which said sum was and is the reasonable value of completing the said work that the said defendant John V. Grogan promised and agreed to do and complete (Tr. 6) * * * That by reason of the wrongful failure and refusal of the said Defendant John W. Grogan to perform his said contract and to complete the work that he had promised and agreed to complete, the plaintiff was required to and did lay out and expend the sum of \$6,483.62 in completing the said work.”
(Tr. 7.)

These allegations of the complaint were specifically denied in the answer of the Appellant (Tr. 31). Thus the Government had the burden of proof under the pleadings to establish the completion of the Grogan contract by it—a burden that was never shifted or changed. That this burden was not sustained by the Government is established by previous argument in Appellant’s initial brief (pages 18 and 19). In this reply brief we now merely emphasize where the burden of proof lay under the pleadings—a burden that the Government assumed by its own complaint and one which it had to assume to establish its claim against the Appellant. Yet in the face of this condition of the

record we now find the Government contending in the brief for Appellee that the Appellant had the burden of establishing that the contract made by the Government after Grogan's default was not in fact a completed contract. This claim of the Government in the light of the pleadings is without any warrant whatsoever and deserves no further reply than has already been given to it.

Incidentally, it should be remembered as to the Government's further argument in this connection that the Government terminated the Grogan contract. Thus in paragraph VIII of the complaint (Tr. 5 and 6) it is specifically alleged by the Government that:

"The plaintiff acting under the authority given to it in the said contract and in accordance with the terms thereof on the said 20th day of July, 1934, notified the said Defendant John V. Grogan in writing that his right to proceed under the said contract was terminated on said date."

Article 15 of the Grogan contract (Tr. 19), now relied upon by the Government, relates to disputes concerning questions of fact arising under that particular contract. Since Grogan's right was terminated under the contract in question, Article 15 thereof had no application thereafter to anything concerning or affecting Grogan or his rights or liabilities and certainly not to disputes arising under a later and separate contract.

In no respect did the Government sustain its burden of proof as to the damage item in question. It did not show completion of the contract as required. Further-

more, it particularly did not even pretend to sustain the burden of proof cast upon it under the further allegations of paragraph 9 of its complaint (Tr. 6 and 7), namely, that it was required to pay its construction engineer for necessary services performed the sum of \$2288.62 and the sum of \$414.00 for expenses of engineers and their salaries.

With entire respect to counsel for the Government, Appellant contends that they have merely clouded the issue in their argument on this point, that the argument is without foundation in fact or in law, and that it is wholly unwarranted under the record. This seems to us to be a case where the Government has simply failed in its proof and is seeking now to disguise that fact with lengthy and wholly irrelevant argument.

THE MATTER OF INTEREST.

This argument is addressed to paragraph III of Appellee's brief. Therein the Appellee relies principally upon *Royal Indemnity Company v. United States*, 313 U. S. 289-296, 85 L. Ed. 1361, to support its claim that the lower court properly allowed interest prior to judgment upon the items of damages allowed in the judgment. But the *Royal Indemnity Company* case, as the court itself declares, is "a suit at law for the recovery of an amount due and owing which petitioner has contracted to pay". Here we have no such condition at all. In the case at bar, we are concerned with an action for alleged damages for claimed breach of a construction contract, and neither

the contractor nor the surety on his bond has contracted to pay the Government a stated sum that is either due or owing ^{to} to a debt under the construction contract. The *Royal Indemnity Company* case, *supra*, is not in point, accordingly, and there is no warrant whatever for citing it as an authority here.

Appellant stands now, as heretofore, upon the doctrine of *U. S. v. Sanborn*, 135 U. S. 271, 34 L. Ed. 122. It stands also upon such further controlling authority as *Redfield, et al. v. Bartel, et al.*, 139 U. S. 694, 35 L. Ed. 310. In the *Redfield* case the court holds:

“Where interest is recoverable, not as part of the contract, but by way of damages, if the plaintiff has been guilty of laches in unreasonably delaying the prosecution of his claim, it may be properly withheld.”

In *United States v. Sanborn*, *supra*, that rule is applied to the Government. This court has recognized the rule in question in *Huntley v. Southern Oregon Sales, Inc.* (C.C.A. 9), 104 F. (2d) 153 and 154.

Here is a case where it appears, from vouchers produced by the Government, that its payments, which it seeks to recover in this action as damages, were completed in 1935 (Tr. 72). It made no demand upon Appellant for payment thereof until November 1st, 1937. This action at bar to recover damages was not filed until nearly three years later, to-wit: Upon August 5th, 1940. The rule of the *Redfield* case is applicable. Furthermore, the damages sought by the Government did not become liquidated in any event as to amount until April, 1942, when the trial court made

its findings of fact and conclusions of law upon which the judgment herein appealed from was entered. In the light of the facts there is no justification for the allowance of interest here prior to judgment on any damages recoverable by the Government.

CONCLUSION.

It is respectfully submitted that there is nothing in the brief for the Appellee that either meets or overcomes the contentions of the Appellant on this appeal. The Government has wholly failed to establish essential allegations of its complaint and is without legal right under the record to recover anything herein. Accordingly the judgment should be reversed and the action dismissed.

Dated, Billings, Montana,
February 1, 1943.

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